PUBLIC PROSECUTOR

v.

ABU BAKAR ABDUL MALEK

HIGH COURT MALAYA, KUALA LUMPUR
MOHTAR ABDULLAH JC
[FT CRIMINAL APPEAL NO. CR 58-13-87]
9 FEBRUARY 1990

CRIMINAL PROCEDURE: *Trafficking in Dangerous Drugs - Evidence of agent provocateur - Material witness not produced - Witness an illegal immigrant - Avenues to prevent witness leaving the country/obtaining evidence at earlier stages - Section 114(g) Evidence Act - Adverse inference against the prosecution - Reasonable doubt - Defence alleging non-knowledge - Question of conversing and understanding the English language.*

EVIDENCE: *Agent provocateur - Section 114(g) - Adverse inference for non-production of material witness - Fault of police to be held against prosecution.*

The accused was charged on the principal charge of trafficking in a dangerous drug and an alternative charge for doing an act for the purpose of trafficking in a dangerous drug.

The evidence of the prosecution basically rested on the testimony of one Alfred Alexander (PW5) a drug enforcement officer from the United States of America who acted as agent provocateur. PW5 in his evidence said that he first met with the accused through the introduction of his own informer. At the first meeting the accused when asked by PW5 informed PW5 that he had heroin for sale. At a second meeting the accused gave PW5 a sample of the drugs and PW5 arranged to meet the accused to complete the purchase of the drugs. PW5 subsequently tested the sample given by the accused in the presence of the local Anti Dadah Unit (CAD) and found to be heroin. The CAD then agreed with PW5 to form a team to handle an operation to apprehend the accused.

The next day PW5 briefed the team to be sent by CAD and later on the same morning the team took their position near the place where the accused was to meet PW5. PW5 then said that when he met the accused he asked to see the heroin and the accused informed him that the heroin would be there shortly. A woman then appeared carrying a red plastic bag and a child. The woman had been previously introduced to PW5 by the accused as the accused's wife. The accused then said something (not in English) to the woman and the woman gave PW5 the plastic bag. PW5 saw amongst other things 28 vials of heroin wrapped in newspaper in the plastic. PW5 asked the accused if the woman knew what was in the bag and the accused said "no" - and that is was just not safe for him to be carrying the same. PW5 handed the plastic bag to the accused and the accused handed the same to the woman. PW5 took back the bag and handed it back to the accused and then PW5 gave the signal for the CAD team to move in.

The arresting officer (PW3) then came forward and wanted to arrest the woman whereupon PW5 gave a signal for PW3 not to arrest the woman but the accused. PW3 then arrested the accused who threw away the bag. PW3 retrieved the bag and found the vials therein. The substance in the vials was subsequently confirmed by the Government Chemist to be 19.08 grams of heroin. Inside the bag was also a key with a white key-chain with the number 110 written on it.

The investigating officer was called and he testified that the woman's name was Fatimah b. Yaacub and that she was a Bangladeshi and had no identification papers and no proper address in Malaysia.

The accused's defence was called. The accused's defence was that he was not involved in the trafficking and he was actually been used by the woman. He denied knowledge of the English language and denied that the woman was his wife. He said that he was a Burmese Muslim who entered Malaysia illegally and that the woman had approached him to ask him to sell certain Siamese herbs. Thereafter all other transactions between the man described by PW5 as his informer and PW5 were organised by the woman. He knew the woman by the name of Babu.

The woman was arrested and released after the expiry of 14 days under s. 117 of the Criminal Procedure Code under a bond to secure her attendance for the prosecution in this matter. However, the police handed her to the Immigration authorities on the same day who had thereafter deported her. Subpoenas were issued to her addressed to an address in Kelantan. Failing to find her, the police issued a press release in the newspapers and made attempts to locate her at various places.

Held:

[1] In view of s. 40A(1) of the Dangerous Drugs Act ("the DDA"), the agent provocateur, PW5 is not presumed to be unworthy of credit as his actions were for the sole purpose of securing evidence against the accused for an offence under the DDA. Section 40A(2) of the DDA allows the admission in evidence of all the statements made by the accused to PW5 as agent provocateur in the course of the various transactions.

[2] At the end of the whole case it is evidently clear that the woman is a material witness whichever version is believed regarding her actual role in the whole affair as the prosecution is contending that she is the innocent courier whereas the accused is contending that she used the accused.

[3] It is pertinent to note that despite the earlier briefing by PW5, PW3's first reaction was to rush to arrest the woman - it can be inferred that the woman had committed the offence.

[4] It would appear that the police considered her to be a material witness (the signing of the bond indicates this) but thereafter promptly initiated action to deport her from the jurisdiction of this Court. The police here had sent an important witness out of the country and then went through the shadowy motions of looking for her high and low in this country.

[5] The question here is whether an adverse inference can be drawn against the prosecution for their failure to produce this witness in view of the actions of the police. The police could have kept the woman in the country by utilising s. 396 of the Criminal Procedure Code ("the CPC") (detention pending trial) or make application for her testimony/deposition to be recorded before she departed or inform the Immigration Authorities accordingly to enable the woman to be detained further pending this trial - there were therefore legal avenues open to the police to secure either the attendance of the woman as a witness or to have her evidence recorded at an earlier date and the police are directly responsible for placing the woman out of the jurisdiction of the Court ...

[6] Following *Munusamy v. PP* - Adverse inference (under s. 114(g) of the Evidence Act) can only be drawn for non-production of an important and material witness to the case.

[7] The hasty decision on the part of the police "to get rid of a material witness in such a serious case" even before the PP has time to issue his consent for the prosecution of the accused, with consent is only given on completion of police investigation and after the PP has perused the investigation file and is satisfied that such a prosecution should be instituted gives rise to some nagging doubt as to the reasons.

[8] Because of the action by the police, the prosecution is now unable to produce the witness at this trial - the prosecution must bear the burden of any fault on the part of the police. Any suspicion or oblique motive on the part of the police in the removal of this woman reflects on the prosecution and the Court has to invoke the adverse inference against the prosecution.

[9] Alternatively, the prosecution has not proven the case against the accused beyond reasonable doubt - the prosecution has not effectively shown that the accused does not speak and understand English. The prosecution also has not produced any witness to identify the accused as the one who was registered in room 110 of the International Hotel and/or that he was staying there with the woman and the child. If this was done then it could be proven that the accused and the woman were husband and wife and the defence story would therefore be untrue.

[10] The accused's story tested against the testimony of PW5 still does not dispel or clear away the grave suspicion that he was knowingly involved in this trafficking of the dangerous drug.

[11] At the end of the whole case, the Court is unable to make any conclusive finding of fact as to which story is true or most probably true. The Court does not believe that the accused was telling the whole truth and the truth may be somewhere in between in which case the woman's evidence is crucial.

[12] PW5's evidence as an agent provocateur is protected and admissible under s. 40A of the Dangerous Drugs Act. Yet the Court has reservations about certain aspects of the evidence as to the involvement of the woman in light of the defence's story.

[13] Although the accused's story cannot really be believed, the Court is compelled by all these nagging thoughts to conclude that the defence has created a reasonable doubt as to the truth of prosecution's story and the guilt of the accused.

[Accused acquitted of both charges.]

Case referred to:
Munusamy v. Public Prosecutor [1987] CLJ (Rep) 221

Legislation referred to:
Criminal Producer Code, s.117, s.396
Dangerous Drugs Act 1952, ss. 39, 39B(1)(a), (1)(c), (2), 40A
Evidence Act 1950, s. 114illus.(g)
Immigration Act, s.34

For the public prosecutor - Foo Lee Mei, Deputy Public Prosecutor
For the accused - N. Kamala Devi; M/s. Nadchatiram Kamala Devi

JUDGMENT

Mohtar Abdullah JC:

The accused was charged on one principal charge of trafficking in a dangerous drug and one alternative charge of doing an act for the purpose of trafficking in a dangerous drug. The charges are as follows:

Principal Charge:

> That you on 1 November 1986 at about 10.45a.m. at a lane beside Bangunan Wisma Motor No. 339, Jalan Tuanku Abdul Rahman, in the Federal Territory of Kuala Lumpur, did traffic in a dangerous drug, to wit, 19.08 grammes of Heroin, and you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80) punishable under s. 39B(2) of the same Act.

Alternative Charge:

> That you between 31 October 1986 and 1 November 1986 at a coffee shop below International Hotel at Jalan Tuanku Abdul Rahman, in the city of Kuala Lumpur, in the Federal Territory did an act for the purposes of trafficking in a dangerous drug to wit 19.08 grammes of heroin and you have thereby committed an offence under s. 39(B)(1)(c) of the Dangerous Drugs Act 1952 (Revised 234/80) punishable under s. 39B(2) of the same Act.

The prosecutions case rests mainly on the testimony of one Alfred H. Alexander (PW5), an American Drug Enforcement Agency officer attached to the American Embassy in Kuala Lumpur, who acted as an agent provocateur to secure the apprehension of the accused. PW5 testified that on 29 October 1986 he had been told by telephone by his own informer that a person known as "Tiger" had heroin for sale. He asked his informer to arrange for a meeting with "Tiger" at 4.00 p.m. the same day. Subsequently, as arranged by his informer, he met "Tiger", whom he identified as the accused, at a coffee shop near Southeast Asia Hotel. PW5 testified:

> After some small talk. I asked the accused if he had heroin for sale. He told me that he did, that he had 29 plastic vials of white heroin that he could sell. I asked him if he was sure its white heroin. He said it was. I asked him where he got the heroin. He said he smuggled it from Thailand ... I asked him if he could supply 1 kilogram of heroin. He said he could and he would do so on his next trip to Thailand. He said he had to sell 29 vials prior to going for more.

PW2 then arranged to meet the accused again on 31 October 1986. On that day, at about 4.00 p.m., PW5 and his informer met the accused at a coffee shop at Jalan Tuanku Abdul Rahman. PW5 did not like the location, and so they walked to another coffee shop near the Hotel International. PW5 further testified:

> I asked the accused if he had sold his heroin. He told me he had 29 vials left. I realised that he would not be able to buy the larger amount for me because he still had his small amount. I asked him for a sample of the heroin. He said he would give me one, and he then left the coffeeshop. He returned in 5-6 minutes and handed me a small plastic vial containing white powder. He said the price was RM180 for each vial. I calculated and told him I would pay him RM5,000 for the 29 vials. I arranged with the accused to meet him the following day, 1 November at 10.00a.m., with my money at the same coffee shop. I then left Tiger and went off with my informer.

After this meeting with the accused, PW5 went to the Cawangan Anti Dadah (CAD) headquarters at Jalan Kia Peng where he met Inspector Nordin bin Abdul (PW3). He informed PW3 what had transpired. Both PW3 and PW5 then conducted a chemical test on the content

of the plastic vial given by the accused to PW5. The test showed positive reaction, indicating that the substance tested was heroin. PW3's superior officer was briefed and he agreed that a team be formed to handle an operation to apprehend the accused.

On 1 November 1986, at about 8.30a.m., PW5 went to the CAD headquarters and briefed Inspector Nordin and his police team on the plans for the operation. Later, as planned, the police team took up various positions near the Hotel International. At about 10.10 a.m., PW5 arrived and parked his car at the entrance of Wisma Motors, near the Hotel International, and went to the coffee shop as arranged. Approximately 10 minutes later, the accused came, accompanied by another man, "a 28-30 years old Indian man." The accused and PW5 then went to PW5's car. Inside the car PW5 showed the RM5,000 he had in an envelope. PW5 then went back to the coffee shop while the accused walked towards the back of the Hotel International. A few minutes later he came back and called PW5 to go to the rear of the car. PW5 asked the accused if he had the heroin, and the accused replied that it would be right there. Then a woman, carrying a child and a pink plastic bag came towards PW5 and the accused. According to PW5, the accused had earlier introduced this woman as his wife after the accused had given PW5 the sample of the drug. PW5 continued:

> Tiger said something to her, not in English, and she handed me the bag. Tiger said the heroin was inside. I asked him if his wife was involved and if she knew. He told me she carried this heroin because it was dangerous for him to carry.

In re-examination, PW5 reconfirmed that the accused had told him that the woman was not aware of what was in the bag. PW5 checked the bag, saw some plastic vials containing white powder in one of the newspaper packages opened by him, and counted altogether 28 vials in the newspaper packages. He then handed the plastic bag to the accused. However the accused passed the bag back to the woman. On seeing this, PW5 took the bag from the woman and gave it back to the accused. PW5 narrated further:

> I told him not to put his wife in jeopardy. I turned and walked with the wife a few feet away and gave a signal to the police to arrest as per our plan.

Inspector Nordin (PW3), on seeing the prearranged signal, immediately rushed towards PW5 and the woman in order to arrest the woman, but PW5 gave a signal to him not to arrest the woman, whereupon PW3 rushed towards the accused and subsequently arrested him. According to PW3, the accused threw the plastic bag which was subsequently retrieved by PW3. Inside the plastic bag were found 6 newspaper wrappers containing altogether 28 plastic vials of white powder which were subsequently confirmed by the Government Chemist to contain 19.08 grammes of heroin, the subject matter of the principal charge. Inside this plastic bag too were some baby things (feeding bottle, napkin, T-shirt) a lady's purse and key with a white a key chain with No. 110 written on it. According to the investigating officer, his investigation showed that the woman was Fatimah bt. Yaakub who claimed to be a Bangladeshi. She had no identification papers and no proper address in Malaysia.

Inspector Nordin (PW3) saw what happened but did not hear the conversation between PW5 and the accused. In view of the provisions of s. 40A(1), of the Dangerous Drugs Act, the agent provocateur, PW5, is not presumed to be unworthy of credit as his actions were for the sole purpose of securing evidence against the accused for an offence under the Dangerous Drugs Act. Section 40A(2) of the same Act allows the admission in evidence of all the statements made by the accused to PW5 in the course of the various transactions from 29 October to 1 November 1986.

Therefore, at the close of the prosecution case, based on all the evidence adduced (which are not inherently incredible) I was satisfied that the prosecution had established a *prima facie* case against the accused on the principal charge as well as on the alternative charge which I had slightly amended, pursuant to s. 158 of the Criminal Procedure Code, to include reference to the particulars of the act complained of.

The amended alternative charge reads:

> That you between 31 October 1986 and 1 November 1986 at a coffee shop below International Hotel at Jalan Tunku Abdul Rahman, in the city of Kuala Lumpur, in the Federal Territory did an act for the purpose of trafficking in a dangerous drug, namely, that you negotiated and made arrangement with one Alfred Alexander to sell to him 29 plastic vials of heroin for the sum of RM5,000, and you have thereby committed an offence under s. 39B(1)(C) of the Dangerous Drugs Act 1952 (Revised 234/80) punishable under s. 39B(2) of the same Act.

I then called upon the accused to enter his defence both on the principal and the said amended alternative charge.

The accused's defence, to put it in a nutshell, is that he was not involved in the trafficking of the dangerous drugs and that he had actually been used by the woman, Fatimah bte Yaakob, whom he knew as Badu, the wife of one Ali Hussein of Kuala Terengganu. He denied that she was his wife. He denied any knowledge of English. Briefly I will try to summarise his long rambling story as follows: He is a Burmese Muslim whose real name is Mohd. Yunus bin Sumania. He had entered Malaysia illegally, the first time being in 1984. He came to Kuala Lumpur on 25 October 1986 to buy frames for Koranic verses. He stayed at the Masjid Pakistan. He met Badu one day in Kuala Lumpur. She asked him to help her in selling what he thought were Siamese medicine. They approached an Indian man at a five-foot way. This man showed some interest in buying the said medicine, which finally resulted in a meeting between Badu, 2 Indian men and the accused. Badu had asked the accused to continue to be present. Badu and the 2 Indian men conversed in Tamil (which accused did not understand). Accused was informed by Badu that agreement had been reached for the sale of the medicine. She requested the accused to again meet her the next day at the Hotel International. The accused kept his appointment the next day at the Hotel International. While waiting for Badu, the 2 Indian men arrived and sat at his table. Then a "white man" came and sat at the same table. One of the Indian men introduced the "white man" to the accused as his friend. A short while later, Badu came and joined them. Badu talked to the 2 Indian men in Tamil, The Indian men in turn talked to the "white man" in English. The accused did not understand the conversation. Then Badu gave him a small bottle with instruction to give it to the "white man". The accused duly passed the said bottle to the "white man". A short while later, they all dispersed. Badu informed the accused that the "white man" had taken the medicine to test whether its good or not and that he would come again the next day. Again Badu requested the accused to be present. The next morning the accused again kept his appointment. While waiting for Badu he was again joined by the 2 Indian men. Later the "white man" came and again joined them at the table. Then the "white man" went out to a car and beckoned the accused to come to him.

The accused said:

> I then told the two Indians I can't speak English, no point me seeing him. I asked them to see the "white man". They told me he was beckoning to me and that I should go. I then went to meet the "white man" who was standing near a car.

The "white man" spoke something in English to the accused which the accused did not understand. Then they went back to the shop. One of the Indian men asked the accused whether he could get some more of the medicine to which the accused replied that it was Badu's medicine and that he knew nothing about it. The "white man" again got up and went out of the car, and again signalled the accused to join him. The accused was annoyed that the "white man" kept calling him, but he was again advised by the 2 Indian men to go to the "white man". The "white man" spoke something in English. Then the accused saw Badu coming, accompanied by a child and carrying a plastic bag. Badu handed the bag to the "white man" who took it and gave it to the accused. The accused returned the bag to Badu, whereupon the "white man" again took the bag from Badu and gave the bag to the accused. The accused continued:

> It left me wondering why this man was taking this bag again and again, and I was so angry at his behaviour. As I was about to return the bag to Badu ... somebody came from behind and held my right arm and said "I am police." At that time the bag slipped from my hand and fell down.

The accused was arrested. The "white man" took Badu away. The 2 Indian men ran away - it left the accused wondering why they should run away.

At the end of the whole case it is evidently clear that this Fatimah or Badu is a material witness, whichever version is believed regarding her actual role in the whole affair. It is part of the prosecution case that this woman had been used by the accused, allegedly her husband, as an innocent pawn or carrier in his drug trafficking transaction. On the other hand, it is the defence contention that she was the one who in fact used the accused to help her sell the so-called Siamese medicine, which, unknown to the accused, were actually heroin. I take note that, despite the earlier briefing by PW5, Inspector Nordin's first reaction on receiving the prearranged signal was to rush to arrest the woman. It can be inferred that he must have considered that the woman had committed the offence.

The accused and this woman were both arrested on 1 November 1986. But she was released on 15 November 1986 on the expiry of 14 days detention (presumably under s. 117 Criminal Procedure Code) as the police, at that early stage of their investigation, was satisfied that she was not involved in the case. The police made her sign a bond (*Exhibit D33*) before a Magistrate, where she bound herself to attend Court on an unspecified date to give evidence in the case against Abu Bakar bin Abdul Malek @ Mohd. Yunus a/l Sumania: in default she would be liable to forfeit RM5,000 to the yang di-Pertuan Agong.

It was only a release on paper. In fact the police promptly, on the same day (15 November 1986), handed her over to the Immigration Authorities who detained her until 19 November 1986 and then deported her to Thailand.

In short, the police apparently considered her to be a material witness, made her sign a bond to appear in our Court, but on the other hand, promptly initiated action leading to her immediate deportation beyond the jurisdiction of this Court. Now for purpose of this trial the police attempted to serve a subpoena on her at an unsatisfactory address stated in the bond as *Kubang Krian, Kota Bharu, Kelantan.* Failing to trace her at the said address, the police issued a press release in the local newspapers and, during the break in this trial, attempted to locate her at Alor Star, Kuala Perlis, Padang Besar, Kelantan and Terengganu in the forlorn hope that she might have possibly re-entered this country illegally. This is like a Wayang Kulit show-the police sent an important witness out of the country and then go through the shadowy motions of looking for her high and low in this country. It seems that the police was hoping against hope that although she might be outside Malaysia, (possibly

in Thailand, Burma or Bangladesh) she might perchance read about the police appeal concerning her in our local newspapers and then decide to re-enter this country, legally or illegally, to be a witness in this trial! Or that, if she had already re-entered this country illegally, she would risk arrest and deportation again in order to testify at this trial!

The question here is whether an adverse inference can be drawn against the prosecution for their failure to produce this witness in view of the actions of the police. The police said they did not know of any way they could have kept the woman in this country. Obviously they overlooked s. 396 of Criminal Procedure Code, which states:

> Whenever it is proved to the satisfaction of a Magistrate that any witness bound or about to be bound by recognisance to give evidence upon the trial of any seizable offence intends to leave the Federation and that the ends of justice would be probably defeated if such person were not present at the trial to give evidence, he may, upon the application of the Public Prosecutor or accused and upon due provisions being made for his maintenance and for compensating him for his detention and loss of time, commit such person to the civil prison until the trial or until he shall give satisfactory security that he will give evidence at the trial.

In the interest of justice, the prosecution could have made an application to the Court under this section and/or make an application to record deposition or testimony of this witness before her departure or removal from Malaysia. The police did not inform the Immigration Authorities that this woman was required as a witness in a Court case and that she had signed a bond to attend Court. If this fact was disclosed to the Immigration Authorities and if their cooperation had been sought by the police to delay her deportation to enable the deposition or testimony of this witness to be recorded in Court, then I am sure the Director-General of Immigration acting within his powers under s. 34 of the Immigration Act or under any other powers vested by law in him, might detain the woman further until such time as arrangement for her removal from Malaysia can be made after her deposition or testimony in Court. The Immigration Authorities will surely assist the police in whatever way it can within the law. In short, there are legal avenues still open to the police to secure the attendance of this witness in Court or to secure the early recording of her deposition or testimony for purpose of this trial.

The police was directly responsible for releasing Fatimah on a bond (which is not worth the paper it was written on) and subsequently placing her out of the jurisdiction of this Court. In *Munusamy v. Public Prosecutor* [1987] CLJ (Rep) 221, Mohamed Azmi SCJ, delivering the judgment of the Supreme Court, states:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any documents, but material document by a party in his possession, or *for non-production of not just any witness but an important and material witness to the case* (emphasis added).

Though the removal of this witness from Malaysia may not be actual suppression of evidence on the part of the police, it is certainly not a normal action one would expert from such an efficient police unit like the CAD. This hasty action gives rise to some nagging doubt why the police, to put it bluntly, should get rid of a material witness in such a serious case even before the Public Prosecutor has time to issue his consent for the prosecution of the accused, which consent to my knowledge is only given on completion of police investigation after the Public Prosecutor has perused the investigation file and is satisfied that such prosecution should be instituted. I note that the Public Prosecutor's consent was given on 30 April 1987

and tendered in the Magistrate's Court on 27 May 1987 whereupon this case was transmitted to the High Court, Kuala Lumpur for trial. Because of this action by the police, the prosecution is now unable to produce this witness at this trial and to either examine her or offer her for cross-examination or offer her to the defence. The prosecution must bear the burden of any fault on the part of the police. Any suspicion of oblique motive on the part of the police in the removal of this woman beyond the jurisdiction of this Court would reflect on the prosecution. Although the learned Deputy Public Prosecutor conducting this case has no oblique motive or hand in the untimely removal of this witness, the Court cannot similarly rule out the existence of any oblique motive on the part of any police officer(s) connected with this case. Therefore, the adverse presumption under s. 114(g) Evidence Act may properly be invoked against the prosecution. In the circumstances, even assuming I do not invoke this adverse presumption against the prosecution, I think that the prosecution's case has been considerably weekened at the end of the whole case.

I take into consideration PW5's testimony that he negotiated and conversed in English with the accused while, on the other hand, the accused denied any knowledge of the English language. The fact is that throughout this trial an Urdu interpreter was used and the accused spoke in Urdu. This fact does not show that the accused does not understand or speak English - but conversely it does not also show that he understand English - and the prosecution has not effectively shown (apart from PW5's testimony) that in fact accused does speak and understand English. The defence called one witness, Zainuddin bin Baharuddin (DW2), a prisoner at Pudu Prison, who had assisted the accused in writing 3 letters in English. The essence of his testimony is that since 1987, when he first came to know the accused in Pudu Prison, he had not heard the accused speaking English and he is positive that the accused does not understand English. So a doubt does exist as to whether the accused speak or understand English, and consequently a doubt exists as to whether the accused actually conversed in English during the negotiation for the sale of the drugs with the "white man" (PW5).

The prosecution adduced evidence that a copy of a police Report (P34) stating that one Abu Bakar bin Abdul Malek had lost his passport was found on the accused. The accused denied he is Abu Bakar bin Abdul Malek. He said that Badu gave P34 to him and told him" You keep it. Whenever police catch you, you show them this report." The prosecution also adduced evidence as to an entry in the Register of International Hotel (P29A) stating that one Abu Bakar bin Abdul Malek was registered in room no. 110. One key to Room 110 (P24B) was found in the plastic bag originally carried by the woman. Apart from the said entry in the Hotel Register, the prosecutor has not adduced any evidence to show that accused in fact was the person who was registered in the said room. No one from the said hotel was called to testify as to the registration and description or identification of the occupant(s) of room 110. All that had been established is that the accused had a copy of the report (P34), the particulars of which tally with the particulars in the Hotel Register (P29A). It is not established that the accused was Abu Bakar bin Abdul Malek, that he was in fact an occupant of room 110 or that he was staying in the said room together with a woman and a child. These secondary facts, if proved, would have been consistent with the prosecution case that accused and Fatimah were husband and wife and, accordingly, the defence story could not possibly have been true. In this respect, I do not think that the prosecution has established beyond any reasonable doubt that Fatimah Yaakub was the wife of the accused and that she had, in fact, been used by the accused as an innocent pawn in his alleged drug trafficking scheme.

Whether Fatimah (or Badu) was also guilty of trafficking in the said dangerous drugs found in the plastic bag is not the issue in this trial. The real issue is whether the prosecution has proved beyond all reasonable doubt that the accused has committed the offences as charged. The accused's story, tested against the testimony of PW5, still does not dispel or clear away the grave suspicion that he was knowingly involved in this trafficking of dangerous drugs. If, as the defence attempts to portray, Badu was an intelligent woman who had made used of the accused during the negotiation and arrangement for the sale of the drugs, why should she then expose herself to danger by personally bringing the drugs to PW5. It is trite law that one cannot convict a person on suspicion alone, however grave it is. At the end of the whole case, I cannot make any conclusive finding of fact as to which story is true or most probably true. I personally do not believe that the accused was telling the whole truth. The truth may be some where in between - and the woman's story, I repeat, would have cast some light either way. Although PW5's testimony as an agent provocateur is protected and admissible under s. 40A of the Dangerous Drugs Act, and is not inherently incredible when considered at the end of the prosecution's case, I cannot but have some reservations about certain aspects of his testimony after assessing it again at the conclusion of the defence case and also in the light the aforesaid nagging doubts in my mind relating to "disappearance" of the woman. Why was PW5 over anxious to ensure that the plastic bag was in the accused's hand before he gave the prearranged signal to Inspector Nordin? Was it to make it doubly sure that the accused was in actual physical possession of the offending drugs? Why was PW5 so anxious to protect the woman at the scene of the alleged crime? Was it a sudden realization that the woman was an innocent victim of her "husband" or is there something more to it than meet the eye?

While no aspersion is cast on the integrity of PW5, his testimony must also be assessed in the light of the fact that he was not an ordinary provocateur. He was a professional anti-narcotic American agent working undercover in Malaysia. He solicited for the purchase of the drugs and made the arrangement for the purchase of the drugs at a location chosen by him. He informed the police, masterminded the plan for the police operation to capture the accused and then acted out his role as the buyer of the drugs. This American agent was informer, agent provocateur and director of operations all rolled into one. In short, he was the brain behind the whole operation. The local police merely acted according to the American agent's plan. Inspector Nordin, following orders from his superiors to carry out the operation, merely saw the actions at the scene from afar but was not near enough to hear the dialogue. PW5's and the accused's versions of the dialogue are different. If Inspector Nordin had been near enough to listen to the conversation, the total picture would have been much clearer.

In the final analysis, although I do not really believe the accused's story I am compelled by all these nagging thoughts to conclude that the defence has created a reasonable doubt in my mind as to the truth of the prosecution's case and as to the guilt of the accused. In the circumstances therefore it cannot be said that the prosecution has proved its case beyond all reasonable doubt that the accused was trafficking in the said dangerous drugs or that, alternatively, he did any act for the purpose of trafficking in the said dangerous drugs.

I therefore find the accused "Not Guilty" and accordingly acquit and discharge him on the principal as well as the alternative charges.

Also found at [1990] 1 CLJ 1179